

1
2
3
4
5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

7 LINDA D. KAGER,)

8 Plaintiff,)

9 v.)

10 JO ANNE B. BARNHART,)
Commissioner of Social Security,)

11 Defendant.)
12)

CASE NO. C04-1858-RSL

REPORT AND
RECOMMENDATION

13 Plaintiff Linda D. Kager appeals to the District Court from a final decision of the
14 Commissioner of the Social Security Administration (the “Commissioner”) denying her
15 application for Disability Insurance Benefits under Title II of the Social Security Act. For the
16 reasons set forth below, it is recommended that the Commissioner’s decision be AFFIRMED.

17 I. PROCEDURAL HISTORY

18 On December 3, 1999, Plaintiff filed an application for Disability Insurance Benefits
19 (“DIB”), alleging disability since February 6, 1996, due to cervical and lumbar compressions with
20 positive MRI, thoracic outlet syndrome (bilateral), and post-concussive syndrome/reduced nerve
21 functioning to limbs. Tr. 74-76, 141. Her application was denied initially (Tr. 44, 46-49) and on
22 reconsideration (Tr. 45, 52-54). On October 15, 2001, Plaintiff had a hearing before
23 Administrative Law Judge (“ALJ”) Arthur Joyner. Tr. 652. Plaintiff, represented by a non-
24 attorney, testified at the hearing. Tr. 665--687. Medical expert Richard Knudsen and

1 vocational expert Michael Swanson also testified. Tr. 681-695. On February 21, 2002, the ALJ
2 issued an unfavorable decision, finding Plaintiff not disabled because she could perform her past
3 relevant work. Tr. 370-376. Plaintiff, now represented by counsel, requested review by the
4 Appeals Council and submitted additional evidence which was dated prior to the hearing
5 decision. Tr. 384, 388-399. The request for review was granted by the Appeals Council, which
6 remanded the matter for further proceedings to fully evaluate the medical evidence, to obtain
7 additional medical evaluations, and for other evidence as necessary. Tr. 383-385.

8 A supplemental hearing was held before ALJ John F. Bauer on March 25, 2003. Tr. 33.
9 Plaintiff testified at the hearing and she was represented by counsel. Additionally, medical expert
10 Dr. Richard Knudsen, lay witness Jan Wesen, and vocational expert Leta Berkshire testified at
11 this hearing. Tr. 699. On June 18, 2003, the ALJ issued a decision finding the Plaintiff not
12 disabled because she could perform her past work. Tr. 575-583. Plaintiff's request for review
13 of that decision was granted by the Appeals Council and the matter was remanded for further
14 proceedings to include consideration of the lay witness testimony. Tr. 585-586.

15 Another supplemental hearing was held before ALJ Bauer on January 5, 2004. Tr. #.
16 Plaintiff, represented by counsel, testified at the hearing. Tr. 750. The ALJ heard testimony
17 from Plaintiff. Vocational expert Paul Tomita was also present at this hearing. *Id.* On March
18 29, 2004, the ALJ issued a decision finding Plaintiff not disabled because she could perform her
19 past relevant work. Tr. 22-32. On July 22, 2004, the Appeals Council denied Plaintiff's request
20 for review (Tr. 13-17), making the ALJ's decision the final decision of the Commissioner. *See*
21 20 C.F.R. § 404.981, 416.1481. Plaintiff timely filed her appeal of this decision with this
22 Court.

II. THE PARTIES' POSITIONS

Plaintiff requests that the Court reverse the Commissioner's decision and remand for payment of benefits. Plaintiff argues that the ALJ erred by: 1) improperly ignoring the findings and disability opinions of Plaintiff's treating and examining physicians; 2) failing to properly address Plaintiff's residual functional capacity pursuant to SSR 96-8P; 3) finding Plaintiff capable of performing her past work without following the mandatory provision of SSR 82-62 and SSR 96-8; 4) violating SSR 83-20 by failing to call a medical expert to assess the onset date of disability based on new medical reports and a 2001 physical capacities report that indicated disability; 5) improperly assessing Plaintiff's credibility; and 6) improperly rejecting most of the lay witness testimony and written statements. Defendant responds that the Commissioner's decision should be affirmed because it is supported by substantial evidence and is free of legal error.

III. STANDARD OF REVIEW

The court may set aside the Commissioner's denial of social security disability benefits when the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence is defined as more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). Where the evidence is susceptible to more than one rational interpretation, it is the Commissioner's conclusion which must be upheld. *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982).

IV. EVALUATING DISABILITY

REPORT AND RECOMMENDATION

PAGE - 3

1 The claimant bears the burden of proving that he is disabled. *Meanel v. Apfel*, 172 F.3d
2 1111, 1113 (9th Cir. 1999). Disability is defined as the inability to engage in any substantial
3 gainful activity by reason of any medically determinable physical or mental impairment, which
4 can be expected to result in death, or which has lasted or can be expected to last for a continuous
5 period of not less than twelve months. 42 U.S.C. § 423 (d)(1)(A).

6 The Social Security regulations set out a five-step sequential evaluation process for
7 determining whether claimant is disabled within the meaning of the Social Security Act. *See* 20
8 C.F.R. § 416.920. At step one, the claimant must establish that he or she is not engaging in any
9 substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b). At step two, the claimant
10 must establish that he or she has one or more medically severe impairments or combination of
11 impairments. If the claimant does not have a “severe” impairment, he or she is not disabled. *Id.*
12 at § (c). At step three, the Commissioner will determine whether the claimant’s impairment
13 meets or equals any of the listed impairments described in the regulations. A claimant who meets
14 one of the listings is disabled. *See Id.* at § (d).

15 At step four, if the claimant’s impairment neither meets nor equals one of the impairments
16 listed in the regulations, the Commissioner evaluates the claimant’s residual functional capacity
17 and the physical and mental demands of the claimant’s past relevant work. *Id.* at § (e). If the
18 claimant is not able to perform his or her past relevant work, the burden shifts to the
19 Commissioner at step five to show that the claimant can perform some other work that exists in
20 significant numbers in the national economy, taking into consideration the claimant’s residual
21 functional capacity, age, education, and work experience. *Id.* at § (f); *Tackett v. Apfel*, 180 F.3d
22 1094, 1100 (9th Cir. 1999). If the Commissioner finds the claimant is unable to perform other
23 work, then the claimant is found disabled.

24 V. SUMMARY OF THE RECORD EVIDENCE

1 Plaintiff, who was born in April, 1947, was 56 years old at the time of the second
2 supplemental hearing before the ALJ. Tr. 74. She has a high school education and she
3 completed several years of college. Plaintiff also completed 600 hours of training in electrolysis
4 in 1989. Tr. 147. She previously worked as a word processor and electrologist. Tr. 141.
5 Plaintiff's medical problems began after she was rear-ended in a car accident in February, 1995.
6 Tr. 158, 437, 718. She was involved in similar rear-end accidents in May, 1997, and again in
7 1999. Tr. 437, 679, 718. Plaintiff was the driver in the first accident, and the passenger in the
8 other two accidents. Tr. 518. Plaintiff identifies the following problems that make her feel
9 disabled and unable to work: atrophy of left leg, problems walking, does not have functional use
10 of her arms, cannot bend her head, unable to sit and sustain a position. Tr. 141, 670-71.

11 Plaintiff's last date insured was June 30, 1999; therefore she has the burden of showing
12 that she was disabled on or before that date. Tr. 136. Other evidence relevant to Plaintiff's
13 allegations is incorporated into the discussion below.

14 VI. THE ALJ'S DECISION

15 The ALJ found that Plaintiff had not engaged in substantial gainful activity since her
16 alleged disability onset date. Tr. 23, 31. He determined that at the time she was last insured,
17 Plaintiff's severe impairments were degenerative joint disease of the neck and back. *Id.* He
18 found that these impairments do not meet or equal the criteria of any listing. Tr. 24, 31. The
19 ALJ determined that at the time Plaintiff's insured status expired, she retained the residual
20 functional capacity to perform sedentary to light work; she also needed a sit/stand option. Tr.
21 30, 32. In reaching this conclusion, the ALJ found that Plaintiff's statements concerning her
22 impairments and their impact on her ability to work are not entirely credible in light of the
23 medical reports and evidence of record. Tr. 24, 31. At step 4, the ALJ found that Plaintiff
24 retained the residual functional capacity to perform her past relevant work. Tr. 31, 32.

25 REPORT AND RECOMMENDATION

26 PAGE - 5

1 Accordingly, the ALJ concluded that Plaintiff was not disabled at any time through the date her
2 insured status expired and she is not entitled to a period of disability or to DIB benefits. Tr. 32.

3 VII. DISCUSSION

4 In the decision at issue in this case, the ALJ states the following at the beginning of his
5 evaluation of the evidence of record:

6 The discussion of the exhibits and other evidence contained in the prior decisions
7 is incorporated herein by reference. The analysis of those exhibits, as well as the
conclusions reached, are also incorporated herein, except as modified below.

8 Tr. 23. Thus, all three of the ALJ's decisions are considered in addressing the issues raised by
9 Plaintiff.

10 A. Opinions of Treating and Examining Physicians

11 Plaintiff argues that the ALJ erred by failing to properly evaluate the disability opinions
12 and findings from her treating and examining physicians concerning her mental and physical
13 impairments. She claims that the ALJ disregarded the opinions of her treating and examining
14 physicians in favor of the opinions from a nonexamining medical expert.

15 More weight is given to a treating physician's opinion than to the opinion of a
16 nontreating physician because a treating physician "is employed to cure and has a greater
17 opportunity to know and observe the patient as an individual." *Magallanes v. Bowen*. 881 F.2d
18 747, 751 (9th Cir. 1989) (quoting *Sprague v. Bowen*, 812 F.2d 1226, 1230 (9th Cir. 1987)).
19 However, the treating physician's opinion is not necessarily conclusive as to either a physical
20 condition or the ultimate issue of disability. *Rodriguez v. Bowen*, 876 F.2d 759, 761-62 n. 7 (9th
21 Cir. 1989). Likewise, greater weight is accorded to the opinion of an examining physician than a
22 non-examining physician. 20 C.F.R. § 416.917(d)(1); see *Pitzer v. Sullivan*, 908 F.2d 502, 506
23 n. 4 (9th Cir. 1990).

24
25 REPORT AND RECOMMENDATION

26 PAGE - 6

1 While the ALJ may disregard the opinion of a treating physician, whether or not
2 controverted, the ALJ may reject an uncontroverted opinion of a treating physician only for clear
3 and convincing reasons. *Magallanes*, 881 F.2d at 751. The same rules applies to the opinions of
4 an examining physician in the absence of legitimate conflicting testimony and any reason for the
5 ALJ's rejection of the examining physician's opinion. *See Pitzer*, 908 F.2d at 506.
6 Where the opinion of the claimant's treating physician is contradicted, and the opinion of a
7 nontreating source is based on independent clinical findings that differ from those of the treating
8 physician, the opinion of the nontreating source may itself be substantial evidence; it is then
9 solely the province of the ALJ to resolve the conflict. *Magallanes*, 881 F.2d at 751. Where, on
10 the other hand, a nontreating source's opinion contradicts that of the treating physician but is not
11 based on independent clinical findings, or rests on clinical findings also considered by the treating
12 physician, the opinion of the treating physician may be rejected only if the ALJ gives specific,
13 legitimate reasons for doing so that are based on substantial evidence in the record. *Id.* at 751,
14 755. *See Ramirez v. Shalala*, 8 F.3d 1449, 1453 (9th Cir. 1993) (applying test where ALJ relied
15 on contradictory opinion of nonexamining medical advisor).

16 In the present case, Plaintiff argues that the ALJ rejected the diagnoses of her treating
17 and examining physicians that she has adjustment disorder, thoracic outlet syndrome, carpal
18 tunnel syndrome, post-concussive syndrome, cervical myelopathy, peripheral nerve entrapment,
19 and a "complex pain management problem" in favor of the opinions of the nonexamining medical
20 expert, Dr. Knudsen, who testified at two of the hearings and disagreed with all of Plaintiff's
21 treating and examining physicians. She argues that the ALJ accepted Dr. Knudsen's opinions
22 without following the regulations for assessing the weight of a physician's opinions and without
23 reviewing evidence that contradicted his testimony. She further argues that the ALJ ignored all
24 the evidence of her mental impairments.

1 A review of the record reveals that in his second decision issued on June 18, 2003, the
2 ALJ discussed the conditions listed above and gave his reasons for concluding that they were not
3 severe impairments for Plaintiff. *See* Tr. 578-79. The ALJ acknowledged that he based this
4 conclusion on “the compelling testimony from the medical expert,” Dr. Knudsen, who “testified
5 that the medical evidence did not support the existence of other diagnoses, despite their mention
6 in the documentary medical record.” Tr. 578.

7 First, in regards to the opinion concerning the existence of myelopathy, the ALJ indicated
8 that Dr. Knudsen challenged this conclusion on the basis that the evidence only indicated the
9 presence of degenerative disc disease in the neck and in the lumbar region. *Id.* Second,
10 regarding the alleged existence of a depressive syndrome, the ALJ stated that Dr. Knudsen noted
11 that Sang Suh, M.D., who described Plaintiff as having “demonstrated significant depressive
12 symptomologies,” did not list findings that showed Plaintiff to be “markedly, clinically
13 depressed” and did not find that her “moderate limitations” prevented all work activity. Tr. 520,
14 578. Third, regarding the diagnosis of thoracic outlet syndrome, the ALJ indicated that Dr.
15 Knudsen stated that this “diagnosis” lacked any clinical evidence and no action was taken on this
16 diagnosis, such as an offer of any surgery to alleviate the supposed symptoms. Tr. 579. Fourth,
17 in regards to carpal tunnel syndrome, the ALJ noted Dr. Knudsen’s explanation that this
18 diagnosis was unaccompanied by electrodiagnostic criteria that would support a finding that the
19 necessary medical criteria had been met. Fifth, in regards to post-concussive syndrome, Dr.
20 Knudsen indicated that the medical record did not show the existence of any significant post
21 concussive head injury.

22 The ALJ indicated that he gave greater weight to Dr. Knudsen’s opinions than to the
23 opinions indicating the presence of these conditions because “Dr. Knudsen has had the advantage
24 of seeing all of the medical evidence: something that has not been possible for the treating
25

1 sources. Thus, Dr. Knudsen has had the additional advantage of seeing the inconsistencies in the
2 medical opinions as well as all of the diagnostic studies.” Tr. 579. While the ALJ’s opinion only
3 briefly summarizes Dr. Knudsen’s reasons for rejecting these conditions as severe impairments, a
4 review of the transcripts of Dr. Knudsen’s testimony at the first supplemental hearing on March
5 25, 2003, shows that Dr. Knudsen expressly pointed to specific evidence in the record that
6 conflicted with a particular diagnosis and he highlighted the absence in the medical records of
7 certain types of diagnostic criteria or testing that would support a particular condition. *See e.g.*
8 Tr. 707-712.

9 In light of these facts, I conclude that the ALJ, relying on Dr. Knudsen’s opinion as a
10 medical expert, has provided specific and legitimate reasons that are supported by substantial
11 evidence in the record for rejecting certain findings and disability opinions of Plaintiff’s treating
12 and examining physicians. Accordingly, the ALJ did not err in evaluating the opinions of
13 Plaintiff’s treating and examining physicians regarding her physical and mental impairments.

14 B. Plaintiff’s Credibility

15 Plaintiff argues that the ALJ’s assessment of her credibility is contrary to SSR 96-7. She
16 contends that the ALJ failed to provide clear and convincing reasons for rejecting her testimony.

17 If a claimant has established an underlying impairment which reasonably could be
18 expected to produce the alleged subjective complaints and there is no evidence of malingering,
19 the ALJ must provide clear and convincing reasons for rejecting the claimant’s testimony. *See*
20 *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996). General findings are insufficient; rather,
21 the ALJ must identify what testimony is not credible and what evidence undermines the
22 claimant’s complaints. *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993); *Varney v. Sec’y of*
23 *Health and Human Servs.*, 846 F.2d 581, 584 (9th Cir. 1988) (Varney I).

1 The ALJ must identify what testimony he finds not credible and what evidence
2 undermines the claimant's complaints. *Dodrill v. Shalala*, 12 F.3d 915, 918 (1993). In assessing
3 credibility, the ALJ may consider, for example: 1) ordinary techniques of credibility evaluations,
4 such as the claimant's reputation for lying and prior inconsistent statements concerning the
5 symptoms; 2) unexplained or inadequately explained failure to seek treatment or to follow a
6 prescribed course of treatment; 3) the claimant's daily activities; and 4) medical evidence tending
7 to discount the severity of subjective claims. *Rollins v. Massanari*, 261 F.3d 853, 856-57 (9th
8 Cir. 2001).

9 In the present case, Plaintiff testified that she has atrophy of her left leg and she does not
10 have full function use of her arms. Tr. 670. Plaintiff described her limitations as follows: she can
11 only pick up a few pounds without having a problem and she cannot walk a block (Tr. 659); she
12 can only sit up to half an hour without having to wiggle around (Tr. 660); she has problems with
13 bathing and dressing because of hardship to her neck and arms (Tr. 666); and she has lost the
14 muscle in her hands, she has pain in both hands and arms, she gets cramping in her hands and her
15 hands also shake if she uses them for fine motor things (Tr. 674). Plaintiff further testified that
16 she can lift less than ten pounds and that lifting hurts her neck. Tr. 719. She stated that she can
17 reach forward, but cannot stay forward (Tr. 719) and she has problems reaching above her head
18 (Tr. 720). She indicated that when she uses her arms, it hurts her neck, and when her neck hurts
19 it affects her vision. If she continues to use her arms, she becomes nauseous to the point of
20 throwing up. Tr. 719. Plaintiff testified that between 1996 and 1999, her average pain level on a
21 daily basis was 5-7 on a scale of 1-10. Tr. 723. Plaintiff also testified that her physical
22 impairments have caused her to have depression and she has a problem with short-term memory.
23 Tr. 724.

24 The ALJ determined that Plaintiff was only partially credible, in light of information

25 REPORT AND RECOMMENDATION

26 PAGE - 10

1 contained in the medical reports and elsewhere in the record. Tr. 24, 374, 581. In the first
2 decision, the ALJ noted Plaintiff's testimony that she used an electric scooter, that she sometimes
3 sleeps in her clothes due to difficulty dressing, and she has difficulty taking a bath or shower.
4 He rejected this testimony on the basis that Plaintiff does not have prescribed pain medication,
5 rather she lies down due to pain. Tr. 374. The ALJ also noted Plaintiff's specific complaints
6 regarding the use of her hands and arms, as described above, and he rejected these claims on the
7 basis that there is no objective evidence in the record that supports such symptoms. The ALJ
8 further noted that Plaintiff's complaints are grossly disproportionate to the clinical findings as
9 well as the opinions of her attending physicians, the state agency review physicians, and Dr.
10 Knudsen's testimony. *Id.*

11 In assessing Plaintiff's credibility in his March, 2004 decision, the ALJ found that she
12 has some limitations in functioning but not to the point of disability. Tr. 28. He noted that she
13 attends swimming exercises and plays outside with her dogs, and she has not had any invasive
14 treatment or significant pain therapy consistent with her alleged limitations. *Id.* He further noted
15 that at one time Plaintiff reported that she fell and injured herself because she was "too frisky"
16 while on the side of a mountain. Tr. 29. The ALJ concluded that this factor indicated that
17 Plaintiff was more agile and physically capable than alleged. *Id.* Although he acknowledged
18 Plaintiff's explanation in the most recent hearing that she was house-sitting at the time and not
19 clambering on a mountainside, the ALJ concluded that she was "nevertheless engaging in a range
20 of daily activities that exceeded her professed limitations." *Id.*

21 These are all clear and convincing reasons based on Plaintiff's daily activities and medical
22 evidence tending to discount the severity of her symptoms. Accordingly, I conclude that the ALJ
23 did not err in finding Plaintiff's testimony not entirely credible.

1 C. Lay Witness Statements and Testimony

2 Plaintiff argues that the ALJ improperly rejected lay witness testimony and written
3 statements to the extent it was unsupported by the medical evidence. An ALJ must consider a
4 lay witness' observations of how the claimant's impairment affects his ability to work. 20 C.F.R.
5 § 404.1513(e)(2); *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996). An ALJ may reject
6 such testimony only if "reasons germane to each witness" are given. *Dodrill v. Shalala*, 12 F.3d
7 915, 919 (9th Cir. 1993).

8 Here, the ALJ evaluated written statements from three lay witnesses, Terry Healy, Sherri
9 Douglas, and Jan Wesen (Tr. 428, 431-32, 433-34), as well as testimony from Jan Wesen at the
10 first supplemental hearing in March, 2003 (Tr. 737-43). A review of the ALJ's decision reveals
11 that he both adequately summarized the content of each witness' written statement/testimony and
12 articulated reasons specific to each statement in assessing the weight to be given to it. Tr. 29.
13 Although for each statement, the ALJ noted that it was not consistent with the medical reports,
14 the ALJ also specifically expressed other reasons for the weight given to each statement.
15 Therefore, I conclude that the ALJ did not err in evaluating the lay witness statements and
16 testimony.

17 D. RFC Assessment

18 Plaintiff argues that the ALJ failed to properly evaluate her residual functional capacity
19 pursuant to SSR 96-8p. She claims that the ALJ ignored the requirements of SSR 96-8p and
20 relied exclusively on Dr. Knudsen's testimony that Plaintiff was able to perform work activity at
21 the sedentary to light levels of physical exertion with a sit/stand option, and he erred in making
22 this RFC finding without conducting a function-by-function analysis with a "narrative discussion
23 describing how the evidence supports each conclusion." Plaintiff also argues that the ALJ failed
24 to assess whether she is capable of working on a "regular and continuing basis."

1 A claimant's RFC is based on what she can still do despite her limitations. *See* 20 C.F.R.
2 § 416.945(a) (2001). At the hearing level, the ALJ evaluates a claimant's RFC at step four of
3 the sequential evaluation process by considering all of the evidence, including any physical and
4 mental limitations. *See* 20 C.F.R. § 416.945(a)(b)(c), 416.946, and SSR 96-8p. SSR 96-8p
5 provides that "[t]he RFC assessment considers only functional limitations and restrictions that
6 result from an individual's medically determinable impairment or combination of impairments,
7 including the impact of any related symptoms." The ALJ is free to accept or reject restrictions
8 that the claimant alleges provided his findings are supported by substantial evidence.
9 *Magallanes*, 881 F.2d at 756-57.

10 The Social Security Regulations require that the ALJ undertake a "function-by-function"
11 analysis of the claimant's capacity to work according to exertional categories.

12 The RFC assessment must first identify the individual's functional limitations or
13 restrictions and assess his or her work-related abilities on a function-by-function
14 basis, including the functions in paragraphs (b), (c) and (d) of 20 C.F.R. 404.1545
15 and 416.945. Only after that may RFC be expressed in terms of the exertional
16 levels of work, sedentary, light, medium, heavy, and very heavy.
17 SSR 96-8p.

18 In the present case, in its review and remand of the ALJ's February, 2002, decision for
19 further proceedings, the Appeals Council indicated that the ALJ had failed to provide sufficient
20 rationale with specific references to evidence in the record in support of the residual functional
21 capacity assessed by the ALJ in that decision. Tr. 383. Accordingly, in his March, 2003,
22 decision, the ALJ assessed Plaintiff's RFC as limited to a light level of physical exertion with
23 additional restrictions. Tr. 580. In support of this conclusion, the ALJ relied on the testimony of
24 medical expert, Dr. Knudsen, and on the findings of a medical consultant for the Disability
25 Determination Service (DDS), Alnoor Virji, M.D.

26 The ALJ noted that Dr. Knudsen, after reviewing the medical record, testified that

1 Plaintiff was able to perform work at the sedentary to light levels of physical exertion, and that
2 she might need a sit/stand option. Tr. 580, 713. The ALJ indicated that further support for his
3 conclusion was found in the Dr. Virji's March 1, 2001, RFC assessment for Plaintiff, wherein he
4 found an even less physically restrictive residual functional capacity. Tr. 340-47, 580. The ALJ
5 notes, "Dr. Virji found that claimant was able to lift and carry 20 pounds occasionally and 10
6 pounds frequently. Additionally, the claimant was capable of sitting and standing/walking for 6
7 hours each during and 8-hour workday." Tr. 580; *see also* Tr. 341. Further, the ALJ indicated
8 that he also considered the entire medical record, including opinions that described Plaintiff as
9 "disabled" or as more restricted in her activities than described in the RFC (Tr. 580), and he
10 considered Plaintiff's testimony concerning her subjective complaints and limitations. Tr. 581.

11 Additionally, in his more recent March, 2004, decision, which incorporates by reference
12 analysis of evidence from the prior decision, the ALJ restates his finding regarding Plaintiff's
13 RFC as follows:

14 Based on an evaluation of the credible evidence in the light of the record as a
15 whole, the undersigned finds that on and before the date she was last insured, the
16 claimant retained the residual functional capacity to perform sedentary to light
17 work. Light work involves lifting no more than 20 pounds at a time, with
18 frequent lifting or carrying of objects weighing up to 10 pounds. A job is also in
19 this category if it requires a good deal of walking or standing, or sitting most of
20 the time with some operation of hand or foot controls. The ability to perform
21 light work usually permits a person to also perform sedentary work. Sedentary
22 work involves lifting no more than 10 pounds at a time, and occasionally lifting
23 articles like files, ledgers and small tools; it is usually performed while sitting, but
24 some standing and walking is often necessary (20 C.F.R. 404.1567). The
25 claimant also needed a sit/stand option.

26 Tr. 30.

Because these facts demonstrate that the ALJ utilized the benefit of the state examiner's
function-by-function assessment, Dr. Knudsen's evaluation of the medical evidence, as well as

1 his own assessments of the medical records and Plaintiff's credibility, I conclude that he did not
2 err in assessing Plaintiff's RFC.

3 E. ALJ's Past Relevant Work Finding

4 Plaintiff argues that the ALJ's finding that she could perform her past relevant work
5 ("PRW") is not supported by substantial evidence and constitutes an error of law because the
6 ALJ concluded that she could perform her past work without doing a functional analysis of her
7 capabilities and comparing them with those required for her prior work as required under SSR
8 96-8p and SSR 82-62.

9 As noted above in subsection "D", the ALJ properly evaluated Plaintiff's residual
10 functional capacity. Additionally, the record shows that when the ALJ presented a hypothetical
11 to the vocational expert on whether Plaintiff, with this RFC, would be able to do her past work,
12 the VE responded that she would be able to do her past relevant work because the electrologist
13 position has an exertional rate of light, and the word processing machine operator position has an
14 exertional level of sedentary. Tr. 743. Therefore, I conclude that the ALJ did not err in relying
15 on the VE's testimony that Plaintiff could perform her past relevant work.

16 F. Alleged Violation of SSR 83-20

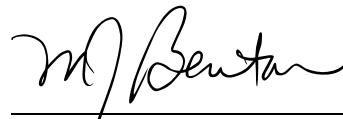
17 Plaintiff argues that the ALJ violated SSR 83-20 by "failing to summon a medical expert
18 to assess the onset date of disability once new medical reports established that Plaintiff meets or
19 equals listing section 4.12, "Peripheral Arterial Disease" and the ALJ determined that a 2001
20 PCE [physical capacities evaluation] indicated disability at the time." Dkt. 14, Plaintiff's
21 Opening Brief, p. 15. She contends that since the ALJ indicates the evidence showed disability in
22 2001 and subsequent reports document possible causes, the ALJ clearly erred by failing to
23 summon a medical expert to determine the disability onset date.

1 However, Plaintiff's argument here is misleading in that she fails to acknowledge that the
2 ALJ expressly rejected the August, 2001 PCE assessment, finding that the "test was performed
3 over two years after the date the claimant was last insured and is of questionable relevance to the
4 issue at hand." Tr. 27. Additionally, the ALJ noted that earlier testing during the relevant time
5 period did not support this assessment. *Id.* Thus, the ALJ concluded that the August, 2001
6 report was not an adequate assessment of the claimant's condition when she was insured. *Id.*
7 Given these facts, I find Plaintiff's argument here to be without merit.

8 VIII. CONCLUSION

9 The Commissioner's determination to deny Plaintiff DIB benefits is supported by
10 substantial evidence and is free of legal error. Based on the record evidence, the undersigned
11 recommends that the Commissioner's decision be AFFIRMED. A proposed Order accompanies
12 this Report and Recommendation.

13 DATED this 8th day of September, 2005.

14
15 

16
17 Monica J. Benton
18 United States Magistrate Judge
19
20
21
22
23
24
25